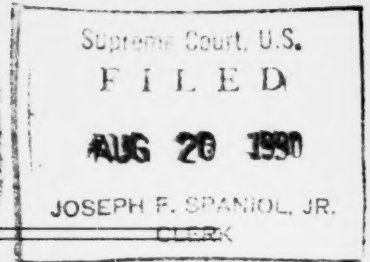


90-321

NO.



IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1990

FREDERICK R. AND MARGARET CLARK, et al.

*Petitioners,*

v.

UNITED STATES OF AMERICA

*Respondent*

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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## **QUESTION PRESENTED FOR REVIEW**

Whether the discretionary function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a), bars an FTCA suit based on the failure of the United States to warn its invitees of, or otherwise protect them from, a latent flash flooding hazard which the United States was aware existed on its land.

## LIST OF PARTIES

The parties in both the District Court and the Ninth Circuit Court of Appeals were as follows:

### Plaintiffs

Joseph W. Balser, Jr., and Madonna H. Balser, surviving parents of Michele Balser, deceased;

Frederick R. and Margaret M. Clark, parents of Kevin Ronald Clark, deceased;

Paula Waid, surviving parent of Michael P. Waid and personal representative of the Estate of Paul Waid, respectively, both deceased, and parent of Stephen Thomas Waid, a minor;

Marge Chatham, surviving parent of Ralph Leroy Chatham, deceased; and

Dolores Roberson, surviving parent of Darla Jean Roberson Heredia, deceased.

### Defendant

United States of America

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## OPINIONS BELOW

The Memorandum Decision by the Ninth Circuit Court of Appeals in Case No. 87-2728, dated March 20, 1990, was not published in either official or unofficial reports. It is reproduced as Appendix A to this Petition for Certiorari.

The Order of Dismissal by the United States District Court for the District of Arizona in Case No. CIV 85-624 TUC-WDB, dated August 7, 1987, was not published in official or unofficial reports. It is reproduced as Appendix B to this Petition for Certiorari.

## STATEMENT OF JURISDICTION

The District Court's Judgment of Dismissal was entered August 10, 1987. Appendix D to this Petition. The Ninth Circuit Court of Appeals' Memorandum Decision affirming the District Court was filed March 20, 1990. Appendix A to this Petition. Petitioner's Petition for Rehearing to the Ninth Circuit was denied by Order dated May 25, 1990. Appendix C to this Petition.

This Petition for Certiorari is being timely filed within 90 days of the denial of the Petition for Rehearing by the Ninth Circuit. 28 U.S.C. § 2101(c); Rules 13.1, 13.4, Rules of the Supreme Court of the United States.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Petition for Certiorari should be granted pursuant to Rule 10, Rules of the Supreme Court, because the District Court and the Ninth Circuit Court of Appeals have:

(a) Decided an important question of federal law which has not been, but should be, settled by this Court;

(b) Decided that issue incorrectly, in a manner which violates the holding of this Court in *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954 (1988), and which conflicts with decisions by two other United States Courts of Appeals on the same issue, *Mandel v. United States*,

793 F.2d 964 (8th Cir. 1986), and *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976).

### **RELEVANT PROVISIONS OF LAW**

The provisions of law involved in this case are 28 U.S.C. §§ 1346(b), 2674, and 2680(a), 36 C.F.R. § 200.4, United States Forest Service Manual §§ 2512.3 and 6703, and the United States Forest Service's internally-generated 1976 Public Safety Action Plan for the Santa Catalina Ranger District. The relevant provisions of all of these are set forth in the Appendix to this Petition.

### **STATEMENT OF THE CASE**

#### **A. JURISDICTION IN THE DISTRICT COURT.**

The District Court had jurisdiction of this case under 28 U.S.C. §§ 1346(b) and 2674.

#### **B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED.**

On the afternoon of Sunday, July 26, 1981, a flash flood, described by various survivors as a "mountain of water", "like a dam that was opened", "a nightmare", and "as fast as snapping your fingers" swept through the Tanque Verde Falls near Tucson, Arizona. The flash flood killed eight people, including Kevin Clark, age 19, Michael P. Waid, age 11, his father Paul Waid, age 33, Ralph Chatham, age 27, Darla Heredia Roberson, age 18, and Michele Balser, age 18, and severely injured Stephen Thomas Waid, age 8.

Tanque Verde Falls is an undeveloped recreation area in the Coronado National Forest, which is owned and managed by the United States, acting through the United States Forest Service ("USFS"). Prior to July 26, 1981, the USFS was aware that Tanque Verde Falls is in a "drainage bottom," that there may be frequent flash floods in the Tanque Verde Falls area during the month

of July, and that such flash floods had occurred in the past.

The USFS also knew that Tanque Verde Falls is "very popular when water is flowing in the picturesque boulder-strewn canyon bottom," that it could expect visitor use during July and August to be greater than other months, with the exception of March and April, and that as many as 50 to 80 people would visit Tanque Verde Falls each weekend day, with heavier use on Sundays, the day of the week on which the accident occurred. Finally, the USFS knew that the Tanque Verde Falls area "is reached from Tucson by driving approximately 30 minutes on a well maintained dirt road and then by walking approximately 1/4 mile into the drainage bottom."

According to 36 C.F.R. § 200.4 (b) and (c), procedures for the conduct of USFS activities are issued as directives, which include the Forest Service Manual (FSM). The stated policy of the USFS, as set forth in Section 6703 of the FSM, is "to reduce the number of injuries, illnesses, and property-damage incidents in situations under Forest Service jurisdiction by . . . (d) *Providing safe and healthful facilities and pertinent safety and health information to visitors.*" [Emphasis supplied].

Specific reference to flood warnings is found at FSM § 2512.3:

Flood Warning and Preventive Action Planning.

Flood probabilities and forecasting have been developed primarily to meet the needs of downstream communities and are of limited use for many National Forest System headwater conditions. Flood stages are not adequately defined for headwater streams. The streams may crest long before crest stage is reached at key forecasting stations.

*Line officers are responsible for initiating, planning, and arranging for obtaining quantitative precipitation forecasts and assisting National Forests with timely flood or high water warnings to expedite damage control activities. Each forest should ultimately develop its own flood and high water warning system. [Emphasis supplied].*

At the local level, a Public Safety Action Plan for the Santa Catalina Ranger District had been developed in 1976. The Public Safety Action Plan was the official policy of the USFS in regard to warning the public of dangers in the Santa Catalina Ranger District. The stated purpose of the plan was to "identify hazard areas and present solutions that would provide for greater public safety." Specifically, hazard areas were to "be identified and the public made aware of these hazards to the greatest degree possible."

The Public Safety Action Plan emphasized that "[i]n addition to informing the general public of hazards, posting hazardous sites and taking action on correctable hazards, it is extremely important that junior high, high school and college students be made aware of the many dangers." Under the heading "TANQUE VERDE FALLS" the Plan noted that Tanque Verde Falls "is used primarily by the 15-20 year old age group." (Four of the eight people killed at Tanque Verde Falls on July 26, 1981 were between 15 and 20 years old, while a fifth was 11 years old.)

Notwithstanding its own policies, and its knowledge of both the higher flash flood hazard in Tanque Verde Falls during July and of higher visitor use of the area on Sundays in that month, on July 26, 1981 the USFS had posted no warning signs pertaining to flash floods or dangers due to weather conditions in the Tanque Verde Falls area, and had taken no other action to assure that

its invitees were made aware of the flood hazard "to the greatest degree possible." It had taken no action to restrict access to the Tanque Verde Falls area or otherwise protect its invitees from the known hazard.

The USFS had seen fit, prior to July 26, 1981, to install several metal signs in the Tanque Verde Falls area, requesting that invitees "[p]lease pack out your trash and that of thoughtless others."

Following the disaster, Petitioners filed timely administrative claims, as required by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* Those claims were denied by the United States in an administrative determination on April 25, 1985. On July 12, 1985, Appellants filed timely civil actions under the FTCA in the United States District Court for the District of Arizona, alleging failure by the United States to monitor upstream conditions, warn the public generally of the increased danger of flash flooding existing during July, and/or take measures to protect members of the general public who were recreational users of Tanque Verde Falls.

Upon a Motion to Dismiss by the United States, the District Court dismissed Appellants' FTCA actions by an Order dated August 7, 1987, holding that the discretionary function exception precluded District Court jurisdiction of those actions.

The Ninth Circuit affirmed this dismissal in a Memorandum Opinion dated March 20, 1990. Petitioners wish to clarify misstatements in that Memorandum Opinion. The Ninth Circuit incorrectly characterized Petitioners' argument as follows:

In the present case, appellants contend that the common law duty of a landowner to protect invitees from harm on one's property was violated and that the viola-



tion somehow places the tort outside the scope of the exception. The Appellants suggest that because the Forest Service has "clear potential liability," the exception should not apply. This argument fails to recognize that negligence is simply not at issue. [Appendix A, p. A-9].

In fact, Petitioners have never claimed that negligence was the issue. Petitioners also did not rely on the potential liability of the United States as the basis for defeating application of the discretionary function exception. Petitioners' claim on appeal, as in this Petition, was that the United States' failure to warn or protect its invitees from a latent flash flood hazard of which it was aware was not conduct which could be removed from district court jurisdiction by the discretionary function exception, because it violated established USFS policies and because it was not a decision grounded in social, economic, or political policy considerations.

Petitioners' Petition for Rehearing was denied, and their Suggestion for Rehearing En Banc rejected, by a Ninth Circuit Order dated May 25, 1990. This Petition is brought within ninety days of that ruling.

## ARGUMENT

### **I. WHETHER THE DISCRETIONARY FUNCTION EXCEPTION BARS PETI- TIONERS' SUIT IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.**

Under the FTCA, the United States may be held liable in tort if a private person would be responsible for

similar negligence under the law of the place where the act or omission occurred. 28 U.S.C. §§ 1346(b), 2674.

At bar, Arizona is the place where the act or omission occurred. Under the law of Arizona, the government may be held liable for breach of its duty of reasonable care to make its premises safe for use by invitees just like any other landowner. *Markowitz v. Arizona Parks Board*, 146 Ariz. 352, 355, 706 P.2d 364, 367 (1985). The landowner duty includes an obligation to *discover and correct or warn of* hazards which it could reasonably foresee would endanger an invitee. *Ibid.* Thus, Petitioners lawsuit against the United States was a valid cause of action under the FTCA.

However, both the District Court and the Ninth Circuit held that the United States' failure to warn its invitees of, or otherwise protect them from, a flash flood hazard which it was aware existed on its land was conduct protected by the discretionary function exception. The District Court dismissed Petitioners' suit, and the Ninth Circuit affirmed.

The correctness of this dismissal is obviously a question of exceptional importance to Petitioners. Each of the Petitioners had one or more loved ones killed in this flash flood.

The United States has also admitted the importance it attaches to this case. In seeking publication pursuant to Ninth Circuit Rule 36-4, the United States made the following statement to the Ninth Circuit:

The decision involves a mixed legal and factual issue of *unique interest and substantial public importance*. The extent to which the government is a guarantor of the safety of National Park or Forest Service visitors is of *keen interest to both the public at large and the public servants who oversee these vast expanses of public lands*

*in the southwest and western United States.*  
[Emphasis supplied]

While Petitioners do not agree with the United States that the issue at bar is “the extent to which the government is a guarantor of the safety of National Park or Forest Service visitors,” Petitioners certainly agree with the United States’ admissions concerning the importance of this case to both the United States and the general public.

Finally, the issue presented at bar is an issue of federal law which is of exceptional importance to FTCA plaintiffs in general. It involves the interplay between the discretionary function exception to the FTCA and the United States’ duty as a landowner to warn or protect its invitees from known latent hazards on its land. It has not been decided in any of this Court’s previous FTCA decisions. It should now be finally settled by this Court, especially since the Ninth Circuit’s decision conflicts with the rulings of two other Circuits on the same issue. See Section III of Petitioner’s Argument, *infra*.

## **II. DISMISSAL IN THIS CASE WAS IMPROPER UNDER *BERKOVITZ v. UNITED STATES*.**

### **A. *Berkovitz* Requires That The Employee’s Action Involve Choice Or Judgment, And That There Be A Decision Grounded In Social, Economic Or Political Policy.**

The dismissal at bar violates this Court’s holding in *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954 (1988), that “[t]he discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.” *Berkovitz*, 108 S.Ct. at 1960.

Although *Berkovitz* was decided subsequent to the

completion of briefing before the Ninth Circuit, Petitioners made the Ninth Circuit aware of the decision through a supplemental authority letter dated July 19, 1988. Nevertheless, the Ninth Circuit did not discuss or even mention *Berkovitz* in issuing its Memorandum Decision on March 20, 1990.

Under *Berkovitz*, an action or omission is not protected under the discretionary function exception if the federal employee's course of action has already been prescribed:

[A] court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. . . . *Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.* In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.

*Id.*, at 1958-59, 1964 (Emphasis supplied).

Moreover, even assuming that choice or judgment are involved, the discretionary function exception will not apply unless there is a governmental action or decision based on considerations of public policy, meaning social, economic or political policy:

[A]ssuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the

kind that the discretionary function exception was designed to shield. *The basis for the exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort."* . . . *The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy.*

\* \* \*

[I]f the [agency's] policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful.

*Id.*, at 1959, 1964 (Emphasis supplied).

The actions of the United States did not meet either of the requirements set forth in *Berkovitz* for application of the discretionary function exception.

#### **B. USFS Policies Gave USFS Employees No Choice But To Warn Or Otherwise Protect Invitees.**

There was no room at bar for choice or judgment on the part of USFS employees, because the USFS was already committed to warning and/or protecting its invitees by its own regulations and policies:

(1) Section 6703 of the Forest Service Manual, which set a national USFS policy of "providing safe . . . facilities and pertinent safety . . . information to visitors";

(2) The local Public Safety Action Plan, which set a policy of informing invitees, especially older teenagers, of

hazards "to the greatest degree possible";

(3) With respect to floods, Section 2512.3 of the Forest Service Manual, which made the line officer "responsible . . . for . . . assisting National Forests with timely flood or high water warnings to expedite damage control activities," and stated that "[e]ach forest should ultimately develop its own flood and high water warning system."

Given these policies, there was no room for judgment or choice left to USFS employees. They were required to take steps to warn or protect invitees against the known latent hazard of flash flooding. The discretionary function exception was inapplicable.

**C. Assuming *Arguendo* That USFS Policies Left Room For Choice Or Judgment, The Failure To Warn Or Protect Was Not A "Decision Grounded In Social, Economic Or Political Policy."**

Assuming *arguendo* that USFS policies left room for judgment or choice, which Petitioners deny, the second conjunctive requirement under *Berkovitz* was not met. The USFS has never demonstrated that, prior to the flash flood, it affirmatively decided not to warn or protect its invitees from the known hazard of flash flooding, based on considerations of economic, social or political policy.

At bar, there was a failure on the part of the USFS to warn or protect its invitees. However, this is *not* the same thing as a "decision" not to warn or protect them. The distinction is well illustrated in *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989). There, the First Circuit applied *Berkovitz* and held that the Navy's failure to warn domestic bystanders of asbestos hazards was not within the discretionary function exception, because there had been no affirmative decision by the Navy not to warn, and thus no exercise of judgment which would bring the failure to warn within the discretionary function exception.



Applying *Berkovitz* and *Dube* at bar, the discretionary function exception should have been ruled inapplicable because of the absence of a "decision" not to warn.<sup>1</sup>

Even assuming *Arguendo* that such a "decision" existed, which Petitioners deny, it was not, and was not shown to be, a "decision grounded in social, economic or political policy."

The three purported "policy" bases offered by the United States to the Courts below were actually nothing more than *post facto* attempts to present the USFS conduct as a discretionary act.

The USFS claimed, after the fact, that it lacked the necessary manpower to watch for upstream rains which might cause flash flooding. There is no evidence that such a course of action was considered prior to the disaster. Even if it had been, this argument would only explain why one particular course of action was not taken. It would not constitute a policy basis for USFS failure to take *any steps whatsoever* to warn or protect its invitees.

The USFS also claimed, after the fact, that signs cost \$300 to \$500 each. This evidence suffers from the same flaws discussed immediately above. There was no evidence in the record that the USFS ever actually considered warning signs prior to the disaster, or that the USFS rejected them for cost reasons. Even if warning signs had been considered and rejected, this does not explain why other possible steps to warn or protect were not taken.

This cost argument is also insupportable. The record shows that prior to July 26, 1981, the USFS had seen fit

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<sup>1</sup>Petitioners cited *Dube* to the Ninth Circuit in a Supplemental Authority letter dated September 8, 1989. The case was never discussed in the Memorandum Decision.

to install several metal signs in the Tanque Verde Falls area, requesting that invitees "[p]lease pack out your trash and that of thoughtless others." If the USFS could afford trash signs, it could afford warning signs.

The final *post facto* claim of the USFS was that warning signs had in fact been considered, but rejected. In fact, the record shows that the hazard for which warning signs were considered was the separate and distinct hazard of diving and falling from rocks. There is nothing in the record to show that warning signs against flash floods were ever considered by the USFS.

These spurious USFS "policy" arguments all miss the basic point. There is no evidence that, prior to the disaster, the USFS actually weighed the possibility of warning or protecting its invitees from the known hazard of flash flooding, and then affirmatively chose not to do so based on public policy considerations of an economic, social or political nature.

The discretionary function exception was inapplicable at bar, because the second requirement of *Berkovitz* was not met.

### III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS ON THE SAME ISSUE.

In addition to ignoring and violating this Court's holding in *Berkovitz*, the Ninth Circuit's Memorandum Opinion directly conflicts with decisions by both the Eighth and Tenth Circuits on the same issue.<sup>2</sup>

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<sup>2</sup>It also conflicts with the Ninth Circuit's own previous precedent, holding that the United States' failure as a landowner to warn or protect against latent hazards on its land is *not* within the discretionary function exception. *United States v. White*, 211 F.2d 79, 82 (9th



In *Mandel v. United States*, 793 F.2d 964 (8th Cir. 1986), the plaintiff was paralyzed when he struck his head on a submerged rock while diving. The Park Service did not own the portion of the river where plaintiff was injured, but exercised authority and provided general services along the whole river. The area where plaintiff had been injured had been recommended to him by a Park Ranger. The evidence showed that while the Park Service was not aware of the particular rock that caused the injury, it knew that there were submerged rocks strewn throughout the river. The evidence also showed that although the area where the injury occurred was known by the Park Service to be a very popular swimming area, there were no warning signs posted.

The Eighth Circuit affirmed a District Court finding of negligence against the United States for failure to warn, and specifically rejected the argument that the discretionary function exception applied, holding that the basis for the negligence finding was not the decision of the Park Service to institute a policy of warning of hazards, but the failure of Park Service personnel to comply with the previously adopted safety policy. The Eighth Circuit specifically cited the Ninth Circuit's own statement in *Ducey v. United States*, 713 F.2d 504, 515 (9th Cir. 1983):

[T]he judgment and decision-making involved in day-to-day management of a recreational area are not the sort of decision-making contemplated by the discretionary function exemption.

*Ducey. Id.* at 968.

Allowing for the difference in the hazard itself, the  
 Cir. 1954) (unexploded shells); *Henderson v. United States*, 827 F.2d 1233, 1234, n. 1 (9th Cir. 1987) (dangling electrical wires). Although Petitioners pointed this out in seeking rehearing, the Ninth Circuit denied their request without discussion. Appendix C to Petition.

relevant circumstances of this case are all virtually identical with those in *Mandel*. The Park Service in *Mandel* knew of submerged rocks strewn throughout the river, while the USFS was aware that Tanque Verde Falls is in a "drainage bottom," that there may be frequent flash floods in the Tanque Verde Falls area during the month of July, and that such flash floods had occurred in the past. The Park Service in *Mandel* knew that the place of injury was a popular swimming area, while the USFS knew that Tanque Verde Falls is "very popular when water is flowing in the picturesque boulder-strewn canyon bottom," that it could expect visitor use during July and August to be greater than other months, with the exception of March and April, that as many as 50 to 80 people would visit Tanque Verde Falls each weekend day, and that there would be heavier use on Sundays, the day of the week on which the accident occurred. The USFS even knew the route people took from Tucson to reach Tanque Verde Falls. As discussed previously, it was so well aware of the popularity of the Tanque Verde Falls area that it had installed metal signs asking invitees to pack out their trash.

Like the Park Service in *Mandel*, the USFS took no action to warn invitees or otherwise protect them against the latent natural hazard of which it was aware. Nevertheless, unlike the Eighth Circuit in *Mandel*, which held the discretionary function exception inapplicable, the Ninth Circuit ruled that it applied.

The Ninth Circuit's decision also conflicts with *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976). In *Smith*, a 14-year-old visitor to Yellowstone National Park was injured when he fell into a superheated thermal pool. The government argued that the decision not to put up signs warning of this natural hazard was part of its decision to leave parts of Yellowstone Park undeveloped.

The Tenth Circuit rejected this argument:

We feel that the decision not to give warnings must be examined separately in order to determine the applicability of §2680(a). Similar decisions to omit warnings of dangerous or hazardous conditions have been held not to come within the exception for discretionary functions. . . . As *was the [Ninth Circuit] Court [of Appeals] in the White case . . . we are convinced that the government's decision, as a landowner, not to warn of the known dangers or to provide safeguards cannot rationally be deemed the exercise of a discretionary function.* [3]

*Smith, supra*, 546 F.2d at 877 (citations omitted) [Emphasis supplied].<sup>4</sup>

Petitioners request that this Court resolve the conflict between the Circuits, and do so by reversing the Ninth Circuit's incorrect decision.

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<sup>3</sup>The *White* case to which the Tenth Circuit referred was the Ninth Circuit's decision in *United States v. White*, 211 F.2d 79 (9th Cir. 1954), cited in footnote 2, *supra*.

<sup>4</sup>*See also Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989) (Failure to warn swimmers of dangerous conditions in popular swimming area not within discretionary function exception); *Butler v. United States*, 726 F.2d 1057 (5th Cir. 1984) (While government's decision to repair seawall and to dredge for sand needed for the repairs would be within the discretionary function exception, the failure to post signs or otherwise warn of the hazard in which plaintiff drowned was not.)

**CONCLUSION**

For all of the reasons discussed above, Petitioners' Petition for Writ of Certiorari should be granted.

DATED: August 17, 1990.

Respectfully Submitted,

Janice A. Wezelman

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Counsel of Record for

Petitioners

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APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FREDERICK R. CLARK and MARGARET CLARK, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA

Defendant-Appellee.

No. 87-2728

DC No. CV-85-0624-WDB

**MEMORANDUM**

[Filed March 20, 1990]

Appeal from the United States District Court  
for the District of Arizona  
William D. Browning, District Judge, Presiding

Argued and Submitted March 17, 1989  
San Francisco, California

Before: POOLE, BOOCHEVER and WIGGINS, Circuit  
Judges.

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appellants appeal from the district court's order granting the government's motion for dismissal for lack of subject matter jurisdiction. Appellants contend that the discretionary function exemption to the Federal Tort Claim Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, is inapplicable in the context of this case.

We affirm.

### **FACTS AND PROCEEDINGS**

This is an action for wrongful death. On July 26, 1981, a flash flood swept through the Tanque Verde Falls area of the Coronado National Forest. Eight people were killed in the flood and several more were injured. The deceased included: Michele Balser, age 18; Kevin Clark, age 19; Michael P. Waid, age 11; Paul Waid, age 33; Ralph Chatham, age 27; and Darla Heredia, age 18. Steven Waid, age 8, was severely injured.

The appellants are the relatives of the deceased: Joseph W. Balser, Jr. and Madonna H. Balser, parents of Michele Balser; Frederick R. and Margaret M. Clark, parents of Kevin Clark; Paula Waid, parent of Michael Waid and personal representative for the Estate of Paul Waid; Marge Chatham, parent of Ralph Chatham; and Delores Roberson, parent of Darla Heredia.

The deceased were recreational users of the Tanque Verde Falls area of the Coronado National Forest. This National Forest is managed by the United States Forest Service.

Procedures governing the administration of National Forests are contained in the Forest Service Manual ("FSM"), issued by the Forest Service central office in Washington, D.C. See 36 C.F.R. § 200.4. Safety and health directives are found in Title 6700 of the FSM. FSM § 6703 provides, in part:

The policy of the Forest Service is: . . .

2. To reduce the number of injuries, illnesses, and property damage incidents in situations under Forest Service jurisdiction by: . . .

d. Providing safe and healthful facilities and pertinent safety and health information to visitors.

With regard to flood warnings, FSM § 2512.3 provides:

Flood Warning and Preventive Action Planning.

Flood probabilities and forecasting have been developed primarily to meet the needs of downstream communities and are of limited use for many National Forest System headwater conditions. Flood stages are not adequately defined for headwater streams. The streams may crest long before crest stage is reached at key forecasting stations.

Line officers are responsible for initiating, planning, and arranging for obtaining quantitative precipitation forecasts and assisting National Forests with timely flood or high water warnings to expedite damage control activities. Each forest should ultimately develop its own flood and high water warning system. (emphasis added).

Pursuant to these directives, in 1976, the Coronado National Forest created its Public Safety Action Plan. The plan was submitted by the District Ranger, the "line officer" for the Santa Catalina Ranger District, and included action for the Tanque Verde Falls area. The plan identified safety hazards within the district and directed actions to minimize risk to visitors. The plan included placing signs at the Tanque Verde area to warn of the primary hazards, diving into shallow pools and slipping from steep slopes. The District Ranger eventually discarded the idea of warning signs due to the multitude of access trails into the Tanque Verde Falls area.



This area is not a permanent recreational facility, but rather a rugged, wild river area flowing down a steep canyon in the Santa Catalina mountains, near Pima, Arizona. Usage of this area is heaviest in March and April, followed closely by July and August.

At the time of formulating the action plan, the District Ranger did not identify flash floods as a safety hazard. Prior to the flood of July 26, 1981, there had been no injuries or fatalities attributable to flash flooding in the Santa Catalina Ranger District. The Ranger was aware that there was always potential for flash floods in any of the canyons in the Santa Catalina mountains during the summer rainy season. However, the Tanque Verde Falls area was no more at risk than any of the other canyons within the area. Two previous flash floods had occurred in the Sabino Canyon area, but with damage only to property.

The Forest Service does not have an articulated policy regarding the identification of all natural hazards. Emphasis has been on man-made hazards in connection with developed areas, such as trails and campgrounds. The Tanque Verde Falls area is completely undeveloped, reachable only by a dirt road and a half mile hike.

The U.S. Geological Survey had a stream gauge located one and a half miles downstream from the Tanque Verde Falls area. It registered a flash flood on July 25, 1981. It also registered the flash flood of this action and a much larger flash flood four days later. The flood of July 26, 1981 had a recurrence interval of once every two years; the later flood had a recurrence interval of approximately once every fifty years.

On July 26, 1981, there were no warning signs posted alerting to the dangers of flash floods, nor was access to the Tanque Verde Falls area restricted. The only posted sign requested that visitors pack out their trash. The weather was clear and sunny on that date.

After the accident, the plaintiffs filed timely administrative claims, pursuant to 28 U.S.C. § 2671 *et seq.* These claims were denied by the United States on April 25, 1985. Plaintiffs then filed this action in the United States District Court for the District of Arizona under the FTCA on July 12, 1985. The district court had jurisdiction under 28 U.S.C. § 1346(b). On January 22, 1986, the district court consolidated the complaints for future proceedings.

The complaints alleged that the United States had been negligent in: (1) failing to warn the public of the danger of flash floods as a result of conditions that the United States knew or should have known existed during July, 1981; (2) failing to monitor upstream conditions which the United States knew or should have known would result in flash flooding; and (3) failing to take measures to protect the public who were recreational users of the Tanque Verde Falls.

On May 15, 1987, the United States moved to dismiss the consolidated complaints for lack of subject matter jurisdiction contending that they were barred under the discretionary function exception of the FTCA. After a hearing, the court entered an order granting the government's motion to dismiss. Judgment was entered for the United States on August 10, 1987. This appeal was timely filed on September 24, 1987.

## ISSUE

Whether the district court erred in finding that the discretionary function exemption of the FTCA precluded review of this case.

## DISCUSSION

### I. Standard of Review

We review *de novo* the district court's determination that the discretionary function exception of the FTCA

applies. *West v. FAA*, 830 F.2d 1044, 1046 (9th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988).

## II. Discretionary function exception

The United States enjoys immunity from all suits except to the extent that it consents to be sued. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). When the government does waive its sovereign immunity, "limitations and conditions upon which the government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman*, 453 U.S. at 161 (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)).

The Tort Claims Act, 28 U.S.C. § 2674, provides, in relevant part:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The discretionary function exemption, found in 28 U.S.C. § 2680(a), removes from district court jurisdiction, "any claim ... based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee whether or not the discretion involved be abused."

The Supreme Court has articulated the boundaries of the discretionary function exception in *Dalehite v. United States*, 346 U.S. 15 (1953), and in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

In *Dalehite*, an explosion of stored fertilizer in Texas resulted in hundreds of casualties. The decision to store the fertilizer was made by the United States War Depart-

ment in an attempt to alleviate hunger in Germany, Japan and Korea following World War II. The Supreme Court held that the claims were barred by 28 U.S.C. § 2680(a). The Court, in discussing the rationale behind the discretionary function exception, explained that "it was not intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort." *Dalehite*, 346 U.S. at 27. The type of discretionary act to be exempted from suit is that "of the executive or the administrator to act according to one's judgment of the best course". *Id.* at 34. "Where there is room for policy judgment and decision there is discretion." *Id.* at 36. The Court concluded that the decisions to store the fertilizer were not subject to suit because they were "responsibly made at a planning rather than operational level". *Id.* at 42.

In *Varig Airlines*, the United States was sued by the insurer of a damaged aircraft and the owner of another aircraft who claimed that the Federal Aviation Administration ("FAA") had negligently inspected and improperly certified the two aircraft. The deficiencies in inspection led to in-flight fires in the two aircraft, with resulting crashes.

The Supreme Court refined the parameters of the type of act which qualifies as a discretionary function. Rather than examining the level of decision-making, "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee - whatever his or her rank - are of the nature and quality that Congress intended to shield from tort liability." *Varig Airlines*, 467 U.S. at 813. The Court further held that the exception "plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Id.* at 813-14. The underlying basis

for the exception was that "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814.

The Court held that "[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary authority of the most basic kind." *Varig Airlines*, 467 U.S. at 819-20. Moreover, decisions of enforcement or supervision require the agency to balance its policy objectives "against such practical considerations as staffing and funding." *Id.* at 820. Thus, the discretionary function exception was born of necessity in order to avoid 'second guessing' of such policy-making decisions.

In the present case, appellants contend that the common law duty of a landowner to protect invitees from harm on one's property was violated and that the violation somehow places the tort outside the scope of the exception. The appellants suggest that because the Forest Service has "clear potential liability", the exception should not apply. This argument fails to recognize that negligence is simply not at issue. Unlike a landowner, the government can foreclose suit against itself by withdrawing the district court's jurisdiction. If discretion is involved, it does not matter whether or not the conduct would otherwise constitute a tort. "Negligence, however, is irrelevant to the discretionary function issue. The FTCA itself exempts discretionary functions 'whether or not the discretion involved was abused.' 28 U.S.C. § 2680(a)." *Mitchell v. United States*, 787 F.2d 466, 468 (9th Cir. 1986), *cert. denied*, 484 U.S. 856 (1987). The only inquiry is whether or not the act in question was discretionary.

Appellants claim that the district ranger had no discretion, but was mandated by the national and local

policies to identify the Tanque Verde Falls area hazards to "the greatest degree possible." To support this proposition, Appellants rely on *ARA Leisure Services v. United States*, 831 F.2d 193 (9th Cir. 1987) for the proposition that negligent failure to perform express non-discretionary duties falls outside the exception. In *ARA*, a tour bus crashed off the road in Denali National Park. The road had been badly eroded and was not equipped with guardrails. We concluded that the decision to build the road without guardrails was not actionable because it was a discretionary decision based upon a Park Service policy to design "aesthetically pleasing" roads that "lie ... lightly upon the land utilizing natural support wherever possible." *ARA*, 831 F.2d at 195 (citation omitted).

However, we held actionable the failure to maintain the road in reasonably safe condition for the safety of the public in tour buses which were encouraged to travel the road. Specifically, we said that if the duty was non-discretionary and negligently performed, the exception does not apply. Quoting the Eighth Circuit in *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986), we stated that "[w]here the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the United States will be held responsible for the negligence of its employees." *ARA*, 831 F.2d at 195. That is the holding of *ARA*; a different situation obtains here.

In the case before us, the District Ranger did have discretion to determine flood warning procedure. FSM 2512.3 specifically invests in the line officer discretion to develop flood warning systems. While the overall policy of the Santa Catalina Ranger District was to identify and warn the public of hazards "to the greatest degree possible," that language refers to hazards identified within the action plan. The author of the plan, District Ranger



Vernon Zarlingo, stated in his deposition that, in his judgment, he did not consider flash flooding as a hazard. As a result, flash floods were not identified as a hazard within the action plan.

The difficulty with the appellants' argument lies in their assumption that the rather vague policy statements of warning the public "to the greatest degree possible" constitute a guarantee of public protection, the failure to provide which constitutes actionable negligence. Were this so, there would be an end to the discretionary function exception. The policy statement is not a specific directive to place a warning sign at Tanque Verde Falls. Rather, it is a suggestion of intent to make the National Forest as safe as possible with the available resources. As this court noted in *Martin v. United States*, 546 F.2d 1355, 1360 (9th Cir. 1976), *cert. denied*, 432 U.S. 906 (1977), it was not the intention of Congress, in enacting the FTCA, to make the United States an insurer of the safety of all National Park visitors. In *Martin*, a visitor to Yellowstone National Park was attacked by a bear. The victim disregarded warnings which he had received. This court held, in reversing the district court, that the discretionary function exception precluded any cause of action because the Park Service had discretion regarding bear handling procedures within the park. The court stated that "to hold that failure to warn such individuals is actionable negligence is for Congress and not the courts." *Id.* at 1361.

In *Schieler v. United States*, 642 F. Supp. 1310 (E.D. Cal. 1986), the plaintiff was struck by lightning while standing on a rock in the Sequoia National Park. The plaintiff raised an argument similar to that of the appellants here contending that the failure to warn of the dangers of lightning strikes was outside the discretionary function exception and the United States had a duty as a landowner under California law to protect invitees.

The district court found those contentions to be with-

out merit. In discussing whether the failure to warn was within the discretionary function exception, the district court, quoting *Begay v. United States*, 768 F.2d 1059, 1062 (9th Cir. 1985), stated that the exception applies to cases not involving strictly "regulatory action of an agency." *Schieler*, 642 F. Supp. at 1312. The court found that the National Park Service had received discretion from Congress as to the regulation, care and maintenance of National Parks and explained that "[w]hile posting of warning of lightning strikes is but one manner of warning, it clearly demonstrates that any type of warning would require the exercise of judgment and discretion by the park service personnel, which requires considerations impacting the social and economic policy of the agency." *Id.* at 1313. The court held the discretionary function exception was intended to protect against judicial scrutiny of the decision to place or failure to place warnings of safety hazards. *Id.*

The court rejected the argument that landowner duties would be outside the exception and held that "if the act complained of falls within the discretionary function exception, plaintiff's action is barred, and it is irrelevant that the government was negligent." *Id.*

## CONCLUSION

The *Schieler* case is precisely the case before this court. If discretion was vested in the District Ranger, then the decision-making process involving the posting of warning signs at Tanque Verde Falls is outside the purview of the courts under the discretionary function exception. While this is undeniably a tragic incident, the FSM clearly grants discretion as to flood warnings in the National Forest areas to the "line officers." See FSM § 2512.3. Because the decision not to post the flood warning falls within the discretionary function exception, the government is not subject to suit under the FTCA and the judgment of the district court must be **AFFIRMED**.



APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FREDERICK R. and MARGARET M. CLARK, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CIV 85-624-TUC-WDB

ORDER

[Filed August 7, 1987]

Plaintiff brought this personal injury and wrongful death action under the Federal Torts Claims Act (FTCA) alleging that the United States had a duty to warn users of the Tanque Verde Falls area of the dangers of flash flooding. The United States has moved to dismiss this action based on the discretionary function exception of the FTCA 28 U.S.C. 2680 (a) which, if applicable, would bar this suit.

The sole issue is whether the decision of a District Forest Ranger as to what warnings to give park visitors constitutes the type of basic policy decision that Congress intended to insulate from liability under the discretionary function exemption. Under 28 U.S.C. Section 2860 (a) the provisions of the FTCA do not apply to:

Any claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

In the past, courts distinguished between decisions made at the operational level from those made at the planning level. Discretionary decisions are made at the planning level and are considered part of a government policy and therefore are not subject to judicial review. In 1984 the United States Supreme Court decided *United States v. S.A. Empresa de Viacao Aerea Rio Grandense, (Varig Airlines)*, 467 U.S. 797 (1984), in which it rejected the operational/planning distinctions previously used. The Supreme Court set forth several factors to use in determining whether a claim is based upon the performance of a discretionary function and would therefore be immune from suit under 2680 (a).

The first factor identified in *Varig* is whether the challenged actions are of the nature that Congress intended to shield from tort liability. *Id.* at 813. Under this factor, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. *Id.*

In urging that this lawsuit does not fall under the discretionary function exemption, plaintiff argues that the District Forest Service Ranger's decision not to warn visitors of the possibility of flash floods in the Tanque Verde Falls area was not the type of decision that Congress intended to be considered discretionary. Relying on the United States Forest Service directives which come from the Forest Service Manual (FSM), the plaintiff alleges that safety and health directives are not discretionary because they are included in the FSM section

6703: The policy of the Forest Service is: . . . 2. To reduce the number of injuries, illnesses, and property-damage incidents in situations under Forest Service jurisdiction by; \*\*\* Providing safe and healthful facilities and pertinent safety and health information to visitors. (Defendant's Motion to Dismiss, Exhibit A).

The defendant contends, however, that the government is immune from liability in this action, because under the FSM directive, the District Forest Ranger had the authority to decide exactly how to protect public safety. No specific guidelines are given in the FSM for use by the District Forest Ranger, leaving the determination of safety policies and procedures to the discretion of the lower levels administrators.

The plaintiff also relies on the Public Safety Action Plan which was initiated at the local district ranger level. The district rangers, in accordance with board directives in the FSM, established this safety plan which involved the identification and proposed remedial action for certain hazardous areas which could be achieved despite budgetary and manpower constraints.

The undisputed facts indicate that the Park Service had a general statutory duty to promote safety and the District Forest Ranger had the authority to decide exactly how to protect public safety. The operational decisions and plans the plaintiff considers deficient embody those Forest Service policy decisions. As such, these decisions and plans clearly fall within the discretionary [sic] function exception.

The second factor discussed in *Varig* is whether judicial review would encroach upon an agency's decisions. The basis for the inclusion of an exception for discretionary function in the FTCA was Congress's intent to prevent judicial "second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in

tort. *Varig*, 467 U.S. at 814.

Again, a review of the decision to post or not to post a warning sign or of failure to make such a decision, encroaches into the decision making process of the Park Service. The Court would have to second-guess the discretionary authority and decision making process of the Forest Service in determining the nature and extent to which the public should be warned of natural hazards. This conclusion is supported by the holding of the Ninth Circuit in several decisions since *Varig*. See also, *Chamberlin v. Isen*, 779 F.2d 522, 523, (9th Cir. 1986) (FTCA's discretionary function exemption applied to shield patent examiner from tort liability based on examiner's conduct in rejecting patent application); *Begay v. United States*, 768 F.2d 1059, 1064 (9th Cir. 1985) (Attorney General's decision not to disclose certain information is a discretionary decision and is clearly the type of agency decision Congress sought protect [sic] from judicial review under the FTCA).

In *Schieler v. United States*, 642 F. Supp. 1310 (E.D. Cal. 1986), a very similar tort claim was filed alleging that the National Park Service was negligent in not warning of the danger of lighting [sic] strikes. The court held that the discretionary function exemption to the FTCA barred suit. The court stated: "... any type of warning would require the exercise of judgment and discretion by the Park Service personnel, which requires considerations impacting the social and economic policy of the agent. ... A review of the decision, or of the failure to make such a decision, would encroach into the decision making process of the Park Service." *Id.* at 1313.

The *Schieler* decision also considered the issue of whether the discretionary function exemption can apply if an agency does not make an affirmative decision not to warn of a danger. The court answered the question by referring to *In Re: Consolidated U.S. Atmospheric Test-*

*ing Lit.*, 616 F. Supp. 759 (N.D. Cal. 1985), "If the decision to issue or not to issue a "warning" is within the discretionary function exemption, then logically the failure to consider whether to issue one necessarily falls within the exception as well." *Id.* at 776-777.

Several additional factors also indicate that it would be proper to apply the discretionary function exemption in this case. Government acts that are immune from tort liability are not limited to those involving a regulatory agency. *Begay*, 786 F.2d at 1062. In that respect, the discretionary function exemption does apply to the United States Forest Service even though it is not a regulatory agency per se. It is also significant to note that it is irrelevant to the discretionary function issue whether the Forest Service or its employees were negligent in failing to adequately protect the public against flash floods. *Mitchell v. United States*, 787 F.2d 466, 468 (9th Cir. 1986); *Allen v. United States*, 816 F.2d 1417, 1421 (10th Cir. 1987). The FTCA exempts discretionary function "whether or not the discretion involved be abused." 28 U.S.C. 2860 (a) (1982).

Identifying and signing all areas of land intended to be pristine and minimally disturbed would be a requirement fraught with hazard. Legitimate policy decisions such as the economic ability to do so, or economic advisability, or *relative* economic ability all exist. Judicial imposition of such a standard might result in unduly restricting (or barring) public access to government lands and would require ongoing examination of adequacy of warnings, adequacy of placement of warnings, and like considerations by judicial process. Congress clearly intended that such questions be addressed and resolved in the legislative and administrative arenas.

In conclusion, the failure of the United States Forest Service to warn users of the Tanque Verde Falls Area of the potential of flash floods is protected by the discretion-

ary function exemption of the FTCA and is therefore immune from liability for injuries resulting from this natural hazard.

In accordance with the foregoing analysis, IT IS ORDERED that the United State's motion to dismiss is GRANTED. IT IS FURTHER ORDERED that the plaintiff's action be dismissed.

Dated: August 7, 1987

/s/ William D. Browning  
U.S. District Judge

APPENDIX C

NOT FOR PUBLICATION  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
FREDERICK R. CLARK and MARGARET CLARK, et al.  
Plaintiffs-Appellants,  
v.  
UNITED STATES OF AMERICA,  
Defendant-Appellee.  
NO. 87-2728  
DC NO. CV 85-0624-WDB  
ORDER  
[Filed May 25, 1990]

Before: Poole, Boochever and Wiggins, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court in active service has requested a vote on it.

Pursuant to Fed. R. App. R. 35(b), the petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.

APPENDIX D  
UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

FREDERICK R and MARGARET M. CLARK, et al.

v.

UNITED STATES OF AMERICA  
CASE NUMBER CIV 85-624 TUC WDB

JUDGMENT IN A CIVIL CASE

[Filed August 10, 1987]

\_\_\_\_\_ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

\_\_\_\_\_ X Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the United State's motion to dismiss is GRANTED. IT IS FURTHER ORDERED that plaintiff's action is dismissed.

Date: August 10, 1987

RICHARD H. WEARE  
Clerk  
By: s/Kay Christian  
Deputy Clerk

Matula, Wezelman, Frank-USA, OB



APPENDIX E

28 U.S.C. § 1346(b)

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .

28 U.S.C. § 2680(a)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

APPENDIX F

36 C.F.R. § 200.4

§ 200.4          General procedures.

(a) The regulations of the Secretary of Agriculture governing the protection and administration of National Forest System lands are set forth in Chapter 2 Title 36, of the Code of Federal Regulations.

(b) Procedures for the conduct of Forest Service activities are issued as directives by the central office of the Forest Service and by the field offices listed in

§ 200.2.

(c) Directives include: (1) The Forest Service Directives System comprised of the Forest Service Manual and related Forest Service Handbooks. (2) correspondence that relates to decisions or interpretations on specific activities, cases, or incidents, and (3) circular memoranda that contain unpublished policies and procedures which apply to a number of subordinate offices.

\* \* \* \* \*

APPENDIX G

Forest Service Manual § 6703

6703 - POLICY. The policy of the Forest Service is:

1. That, as the highest priority, adequate safeguards and provisions for the protection of life and property shall be incorporated into all Forest Service programs and procedures, regular and emergency, to ensure that the agency will fulfill the obligations of Executive Order 11807, Occupational Safety and Health Act, and 29 CFR 1960.

2. To reduce the number of injuries, illnesses, and property-damage incidents in situations under Forest Service jurisdiction by:

\* \* \* \* \*

b. Providing safe and healthful facilities and pertinent safety and health information to visitors.

\* \* \* \* \*

Forest Service Manual § 2512.3

Flood Warning and Preventive Action Planning.

Flood probabilities and forecasting have been developed primarily to meet the needs of downstream communities and are of limited use for many National Forest System headwater conditions. Flood stages are not adequately defined for headwater streams. The streams may crest long before crest stage is reached at key forecasting stations.

Line officers are responsible for initiating, planning, and arranging for obtaining quantitative precipitation forecasts and assisting National Forests with timely flood or high water warnings to expedite damage control activities. Each forest should ultimately develop its own flood and high water warning system.

APPENDIX H  
PUBLIC SAFETY ACTION PLAN  
Santa Catalina Ranger District

The Santa Catalina Mountains receive over 2,000,000 visitors annually. Most of the 402,00 residents of Pima County are within 30 minutes travel of this popular area.

There are numerous search and rescue missions, serious accidents, and fatalities on the District each year. The purpose of this plan is to identify hazard areas and present solutions that will provide for greater public safety. The Santa Catalina Mountains, being extremely steep and broken, present a myriad of natural hazards, mainly from vertical or nearly vertical rock faces. Hazards associated with man's facilities also exist. Although it is not possible to identify or post all the hazards, it is important that certain areas be identified and the public made aware of these hazards to the greatest degree possible.

In addition to informing the general public of hazards, posting hazardous sites and taking action on correctable hazards, it is extremely important that junior high, high schools and college students be made aware of the many dangers. Records show that this age group is most often involved in problems of search and rescue, injuries and fatalities. Many of the accidents at Seven Falls, Tanque Verde Falls and Chiva Falls are alcohol and/or drug related.

By mutual agreement, search and rescue is managed by the county sheriff. Approximately 90% of all search and rescue missions conducted by the Pima County Sheriff's Department involve the Santa Catalina Mountains. The Sheriff's Department personnel have expressed the need for assistance in purchasing search and rescue equipment. The Forest Service should investigate the possibility of having the two deputies that work full

time in search and rescue activities patrol the District when search and rescue missions are not in progress. This would result in search and rescue personnel spending most of their time on the Santa Catalina District. The possibility of amending existing cooperative agreement between the Forest Service and the Sheriff's Department to help with these needs should be considered.

Following is a list of the areas which have been identified as being particularly hazardous and action items that will increase the user safety.

#### I. TANQUE VERDE FALLS

There are no developed facilities at the Tanque Verde Falls area. The area is very popular when water is flowing in the picturesque boulder-strewn canyon bottom. It is used primarily by the 15-20 year old age group. The area is reached from Tucson by driving approximately 30 minutes on a well maintained dirt road and then by walking approximately 1/4 mile into the drainage bottom.

Hazards of the area are natural except for the lack of parking and sanitary facilities. Blockage of the main road by cars and people on high use days is a concern to the Pima County Sheriff's Department, as well as to Forest Service employees. Search and rescue missions are often impaired by this blockage. The canyon bottom is composed of numerous pools, formed in the granite rock, by the turbulent runoff. The granite has been polished by the water's action, until it is now extremely smooth and slick. Associated with these slick rock pools are the vertical or near vertical rock sides of the drainage. Falling from these steep and slick rocks into a sometimes turbulent high water is the main cause of accidents.

#### Action Items:

1. With the assistance of Pima County Highway Department, develop a parking lot along the Redington Pass Road.

2. Work with the Pima County Sheriff's Department in providing more traffic control on days of heavy use.
3. Place a rail at the overlook, just past the fence.
4. Change barbed wire on main gate to smooth wire.
5. Chip and roughen rock where one is apt to slip and fall any great distance.
6. Place pictorial signs warning of falling danger in strategic locations and list the number of accidents and fatalities that have occurred.

\* \* \* \* \*

#### VII. ACTION ITEMS APPLICABLE TO ALL AREAS:

1. Through a coordinated meeting of responsible agencies, such as the Forest Service, Pima County Sheriff's (Search and Rescue) Department, National Park Service, Arizona Game and Fish Department, develop targets for a film depicting the hazards of outdoor recreation in the mountainous areas surrounding Tucson. This film would serve as the primary means for reaching the younger age group who, as explained previously, are the ones most often involved in problems of search and rescue, accidents and fatalities. Develop a schedule for showing schools and other groups this film.
2. Investigate the possibility of installing a low powered radio transmitter at one or more location to broadcast the information to visitors as they approach the Forest boundary. Possible locations are Redington Pass, the base of the Catalina Highway and Sabino Canyon entrance.
3. Assimilate hazard warnings into VIS programs. Develop outdoor environmental hazard educational programs for presentation to the schools and meetings of various groups.

4. Work with newspapers, television and radio for coverage of accidents and stress prevention in the messages.

5. Incorporate into the dial-a-Smokey Bear telephone message system, a few words about the natural hazards of some of the areas most heavily used by the public.

6. Instill a greater awareness of Forest Service responsibilities for public safety in Forest Service employees who have occasion to contact visitors. Encourage them to discuss safety matters with their contacts and report potentially hazardous situations which could be controlled.

7. Develop a handout safety brochure warning of the hazards of the outdoor environment. Make available at Visitor Centers, work stations, schools, offices, and to field personnel who contact the public.



②

No. 90-321

Supreme Court, U.S.  
FILED  
NOV 16 1990

SPANIOL, JR.  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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FREDERICK R. CLARK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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### **QUESTION PRESENTED**

**Whether the United States is liable under the Federal Tort Claims Act for failing to provide warning of a flash flooding hazard to recreational users of a national forest.**



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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A2-A12) is not reported but the decision is noted at 898 F.2d 156 (Table). The order of the district court (Pet. App. A13-A18) is not reported.

## **JURISDICTION**

The judgment of the court of appeals was entered on March 20, 1990, and a petition for rehearing was denied on May 25, 1990. Pet. App. A19. The petition for a writ of certiorari was filed on August 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Department of Agriculture's Forest Service manages watersheds on National Forest lands to safeguard the water supply and administers recreational resources on those lands. 36 C.F.R. 200.3(b)(2)(ii). Its activities are governed by procedures set forth in the Forest Service Manual (FSM) (1990), issued by the Forest Service's Washington, D.C. office. Pet. App. A3. FSM Section 6703 announces the Forest Service policy to "reduce the number of injuries \* \* \* in situations under Forest Service jurisdiction by \* \* \* [p]roviding safe and healthful facilities and pertinent safety and health information to visitors." Pet. App. A23. With regard to flood warnings, FSM Section 2512.3 provides:

Flood Warning and Preventive Action Planning. Flood probabilities and forecasting have been developed primarily to meet the needs of downstream communities and are of limited use for many National Forest System headwater conditions. Flood stages are not adequately defined for headwater streams. The streams may crest long before crest stage is reached at key forecasting stations.

Line officers are responsible for initiating, planning, and arranging for obtaining quantitative precipitation forecasts and assisting National Forests with timely flood or high water warnings to expedite damage control activities. Each forest should ultimately develop its own flood and high water warning system.

Pet. App. A23. The Forest Service has no articulated policy regarding the identification of natural hazards. *Id.* at A5. Instead, the Service has announced its general policy to promote public safety and has left it to District Rangers to decide exactly how best to protect visitors. *Id.*

at A15. The emphasis has been on man-made hazards, such as trails and campgrounds. *Id.* at A5.

2. In 1976, pursuant to these directives, the Forest Service established a Public Safety Plan for the Coronado National Forest, located in southern Arizona. The plan was drafted by the District Ranger, the "line officer" for the Santa Catalina Ranger District, and included goals for the Tanque Verde Falls area. That area is not a permanent recreational facility; rather, it is a rugged, wild territory near a river flowing down a steep canyon in the Santa Catalina mountains. The area is undeveloped, reachable only by dirt road and a half-mile hike. Pet. App. A4-A5.

The District Ranger identified the major safety hazards in the Tanque Verde area and directed actions to minimize the risks these hazards posed to visitors. Though the initial plan called for signs in the area warning of the primary perils—namely, diving into shallow pools and slipping from steep slopes—the District Ranger eventually rejected the use of these warning signs because the multitude of access trails into the Tanque Verde Falls area made them impracticable. Pet. App. A4. The District Ranger did not identify flash floods as a safety hazard. Though the Ranger knew of the potential for flash floods in any Santa Catalina canyon, prior to the flood herein no one had ever been injured or killed by flash floods in the entire district, and the Tanque Verde Falls area was no more at risk than any of the other canyons in the mountains. *Id.* at A5. Accordingly, on July 26, 1981, there were no warning signs to alert visitors to the danger of flash floods, nor was access to the area restricted. *Ibid.*

3. On July 26, 1981, a flash flood swept through the Tanque Verde Falls area of the Coronado National Forest, killing eight people and injuring several others who were using the area for recreational purposes. Pet. App. A3. Petitioners, relatives of the deceased, filed a wrongful



death action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* The complaint alleged that the United States had been negligent in failing to warn the public of the danger of flash floods, failing to monitor upstream conditions that the United States knew or should have known would result in flash flooding, and failing to take measures to protect recreational users of the Tanque Verde Falls area. Pet. App. A6.

The government moved to dismiss the complaint for lack of subject matter jurisdiction under the FTCA's discretionary function exception. 28 U.S.C. 2680(a). After a hearing, the district court granted the government's motion and dismissed the complaint, finding that the District Ranger had discretion to decide how to protect public safety and that the decision not to warn of flooding fell within that discretion. Pet. App. A13-A18. The court of appeals affirmed. *Id.* at A2-A12. The court explained that "FSM 2512.3 specifically invests in the line officer discretion to develop flood warning systems," and the line officer in this case—the District Ranger—"did not consider flash flooding as a hazard." *Id.* at A10, A11. "Because the decision not to post the flood warning falls within the discretionary function exception, the government is not subject to suit under the FTCA." *Id.* at A12.

### ARGUMENT

The District Ranger's determination not to warn recreational users of Tanque Verde that flash flood hazards exist falls within the FTCA's discretionary function exception. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The FTCA excludes from its waiver of sovereign immunity any claim "based upon the exercise or performance

or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee, \* \* \* whether or not the discretion involved be abused." 28 U.S.C. 2680(a). As this Court has explained, "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). The court of appeals correctly concluded that the discretionary function exception applies in this case.<sup>1</sup>

Petitioners assert (Pet. 8-11) that the court of appeals erred because the Forest Service Manual "specifically prescribes" a system for warning or protecting visitors from flash floods within the meaning of *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). That contention is without merit. The Forest Service Manual simply directs District Rangers to maintain public safety, vesting broad discretion in "line officers" to achieve that objective. See p. 2, *supra*. The Forest Service Manual bears no similarity to the regulations at issue in *Berkovitz*, which established a step-by-step process for licensing and releasing polio vaccines. The District Ranger's decision as to what dangers require warnings or other precautions plainly involves "an element of judgment or choice." *Berkovitz*, 486 U.S. at 536.

2. Petitioners also contend (Pet. 11-13) that the Regional Director's exercise of his discretion was not grounded in public policy considerations of an economic, social, or political nature. That contention is incorrect.

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<sup>1</sup> Petitioners' discussion of negligence under Arizona law (Pet. 7) is therefore beside the point. The discretionary function exception bars the action as a matter of federal law, regardless of state negligence law or even of the defendant's actual negligence.

First, the entire Public Safety Action Plan (Pet. App. A24-A27) represents a careful selection of the most pressing problems facing the Ranger District and a decision of how best to accommodate a number of concerns: the safety of Tanque Verde Falls visitors, the limited resources of the Ranger District, and the needs of the wilderness area. See *id.* at A11. The District Ranger's conclusion that flash floods are not one of the area's main hazards and that the District's limited resources should be directed to protect the public from other dangers represents exactly the type of policy judgment that the discretionary function exception was designed to protect.

Petitioners argue (Pet. 11) that the government failed to demonstrate that it actually weighed economic, social, or political policies in formulating the Public Safety Action Plan. However, "it is unimportant whether the government actually balanced economic, social, and political concerns in reaching its decision. \* \* \* '[T]he relevant question is not whether an explicit balancing is proved, but whether the decision is susceptible to policy analysis.' " *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 891 F. 2d 31, 37 (2d Cir. 1989), quoting *United States Fidelity & Guar. Co. v. United States*, 837 F. 2d 116, 121 (3d Cir.), cert. denied, 487 U.S. 1235 (1988). See also, e.g., *Kennewick Irrigation Dist. v. United States*, 880 F. 2d 1018, 1028 (9th Cir. 1989). The decision whether to undertake the massive effort required to identify and warn or protect against the myriad natural hazards in wild, undeveloped recreation areas is susceptible to analysis based on social and economic policy. The decision not to identify and warn against a particular danger in these areas is therefore exempted from liability.<sup>2</sup>

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<sup>2</sup> Petitioners contend (Pet. 11) that the court of appeals' decision in *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989), requires the

3. Petitioners further contend, incorrectly, that the decision in this case conflicts with decisions of other courts of appeals. See Pet. 13-16. Petitioners' primary case, *Mandel v. United States*, 793 F. 2d 964 (8th Cir. 1986), is entirely consistent with the decision below. In *Mandel*, the court of appeals determined that "[t]he conduct forming the basis of the Park Service's alleged negligence was not the decision to institute a policy of warning park users of the hazards \* \* \* but rather was the failure of Park Service personnel to comply with the previously adopted safety policy." *Id.* at 967. Petitioners' remaining cases (Pet. 15-16 & n.4) involved the failure to post warning signs at the sites of known existing hazards, such as submerged rocks in swimming areas, or weak ground surrounding superheated thermal pools. The action in question here, by contrast, is the District Ranger's decision whether or not to consider an unpredictable natural event to be a danger—an action infused with the very type of policy discretion the exemption was designed to protect from judicial interference. Petitioner fails to recognize this crucial distinction, one on which there is no circuit conflict.

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government to demonstrate that it exercised policy judgment. But the court held in *Dube* that an affirmative exercise of policy judgment is required only in cases where "the government is operating in a capacity \* \* \* highly analogous to private industry \* \* \*," not where the activity "is a traditional governmental function." *Id.* at 798, 799. Here the government was engaged in a traditional governmental function—namely, regulating the public lands. Thus, even if the distinction drawn in *Dube* were valid, it does not require an affirmative showing in this case.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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